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Case No. 82-815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a B & W ENTERPRISES;
HAMILTON INDUSTRIAL REAL ESTATE COMPANY;
RESORT RENTALS; and WHITCO ENTERPRISES,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AND FOURTEEN STATES AS AMICI CURIAE

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RECITATION PURSUANT TO RULE 28.4(b) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Because the constitutionality of the Bankruptcy Reform Act, 11 U.S.C. § 101 *et seq.*, an Act of Congress, is drawn in question by the instant brief, and because neither the United States nor any department, office, agency, officer or employee of the United States is a party to this proceeding, 28 U.S.C. § 2403(a) may be applicable and a true and correct copy of the instant brief has been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

In this proceeding from the Sixth Circuit Court of Appeals, a court of the United States as defined by 28 U.S.C. § 451, the Sixth Circuit Court of Appeals has not pursuant to 28 U.S.C. § 2403(a) certified to the Attorney General the fact that the constitutionality of the Bankruptcy Reform Act, 28 U.S.C. § 101 *et seq.*, is drawn in question.

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Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AND FOURTEEN STATES AS AMICI CURIAE

The Commonwealth of Pennsylvania and the states of California, Connecticut, Idaho, Illinois, Indiana, Missouri, New York, New Mexico, North Carolina, Oklahoma, South Carolina, Vermont, West Virginia and Wisconsin file this brief as *amici curiae* pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

THE INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are the Commonwealth of Pennsylvania and the states of California, Connecticut, Idaho, Illinois, Indiana, Missouri, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Vermont, West Virginia and Wisconsin. The common interest of the *amici* in the instant case is in redressing the erosion of their states' police powers by the Sixth Circuit's misapplication of Sections 105 and 362(a) of the Bankruptcy Reform Act, 11 U.S.C. § 105 and 362(a). In essence, the Sixth Circuit's decision will prevent the *amici* from enforcing various state laws concerning environmental protection against bankrupt violators, no matter how great the immediate danger to the public health and safety. As the chief legal officers for their various states, the interests of the *amici* lie in preserving their ability to protect the citizenry through enforcement of various state police power enactments.

SUMMARY OF ARGUMENT

In conflict with the Fifth Circuit Court of Appeals, the Sixth Circuit Court of Appeals has erroneously applied the "automatic" stay under section 362(a) of the Bankruptcy Reform Act, 11 U.S.C. § 362(a), to the State of Ohio, by enjoining an Ohio proceeding against a bankrupt pursuant to a validly enacted police power statute seeking the abatement of the dangers posed by an unlawful hazardous waste disposal operation. Because the Sixth Circuit's decision sanctions continuing environmental harm by the bankrupt, because the Sixth Circuit's reasoning has led to similar untoward decisions in Pennsylvania and New Hampshire and because the Sixth Circuit's decision will prevent the remaining *amici* from enforcing the laws of their states in similar circumstances, the Court should settle the important question of federal law presented by the applicability of section 362(a) now, in the context of the instant case.

The Sixth Circuit's decision also contravenes the Tenth Amendment, 28 U.S.C. § 959(b) and section 543(c) of the Bankruptcy Reform Act, 11 U.S.C. § 543(c). Given the immediate danger to the citizens of Ohio posed by the illegal disposal of hazardous waste, the exercise of this Court's supervisory powers is urgently required to redress this extreme departure from the ordinarily accepted course of judicial proceedings by the Sixth Circuit.

The Sixth Circuit's decision also conflicts with the reasoning of this Court in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S.Ct. 199 (1982), because the Sixth Circuit has sanctioned the exercise of the judicial power of the United States under Article III by an Article I judge. In order to rectify this inconsistency, the Court should hear the instant case.

ARGUMENT

In conflict with the Fifth Circuit Court of Appeals, the Sixth Circuit Court of Appeals has erroneously applied the automatic stay to state police power actions.

In the instant case, the Sixth Circuit has rendered a decision in conflict with that of the Fifth Circuit on the applicability of the "automatic" stay under section 362(a) of the Bankruptcy Reform Act, 11 U.S.C. § 362(a), to regulatory enforcement action by governmental units. In *Securities Exchange Commission v. First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981), the Fifth Circuit ruled that the automatic stay did not apply to an action against a bankrupt by the Securities Exchange Commission seeking injunctive relief and the appointment of a receiver to remedy various securities law violations. As Ohio correctly notes in its Petition for Writ of Certiorari at pages 15-19, there is thus contradictory precedent in the Circuit Courts of Appeal, requiring resolution of the conflict by this Court.

In sanctioning the application of the automatic stay to state police power actions against bankrupt violators of state law, the Sixth Circuit has also decided an important question of federal law which has not been, but

should be, settled by this Court. The practical result of the Sixth Circuit's decision is to afford the bankrupt an absolute protection against a legitimate state enforcement action and to expose the people of Ohio to the continuing imminent danger posed by the illegal disposal of hazardous waste at the Chem-Dyne site.

Moreover, the Sixth Circuit's interpretation and application of section 362(a) has unfortunately been read and will be read by other courts for its suggestive authority. Such use of the Sixth Circuit's reasoning has already occurred, with devastating impact in the Commonwealth of Pennsylvania and in the State of New Hampshire.

In the case of *In re: Penn Terra Limited*, No. 82-845 (Western District of Pennsylvania, Memorandum Opinion, Order and Judgment dated November 4, 1982—a copy of this opinion appears as Appendix A to this brief), the Bankruptcy Court for the Western District of Pennsylvania, held, *inter alia*, that the Commonwealth of Pennsylvania had violated the automatic stay provisions of section 362(a) when it attempted to seek by injunction in the Commonwealth Court of Pennsylvania the enforcement of an administrative order requiring reclamation of an unlawful strip mine operation. Based upon the reasoning of the Sixth Circuit in the instant case, the bankruptcy court stripped Pennsylvania's Commonwealth Court of jurisdiction despite the requirements of 28 U.S.C. § 1478(a), adjudicated the Commonwealth in contempt, fined the Commonwealth and enjoined the Commonwealth from taking any of the steps necessary to protect its citizens from the legislatively determined [1] dangers posed by the unlawful strip mine operation.

In the case of *United States, et al. v. Johns-Manville Sales Corporation, et al.*, Civil Action No. 81-299-D (District of New Hampshire, Order dated November 15,

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[1] *See, e.g.*, section 1 of Pennsylvania's Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 (Cumulative Annual Pocket Part 1982-1983).

1982—a copy of this order appears as Appendix B to this brief), the United States District Court for the District of New Hampshire affirmed a magistrate's ruling that both the United States and the plaintiff-intervenor State of New Hampshire were enjoined from proceeding with an action seeking an injunction against the allowance or causation of disposal of asbestos and other hazardous wastes and substances by the Johns-Manville Sales Corporation, which is currently the subject of proceedings pursuant to Chapter 11 of the Bankruptcy Reform Act. Again, the district Court cited with approval the Sixth Circuit's decision in the instant case. Just as in the cases of Ohio and Pennsylvania, New Hampshire (and the government of the United States) are prohibited by the federal courts pursuant to section 362(a) from enforcing laws designed to protect the public health, safety and welfare.

The applicability of the automatic stay to such state court police power and federal regulatory proceedings is an important question of federal law which has been decided by the Sixth Circuit in conflict with a decision by the Fifth Circuit. This Court has not yet decided the question. In order to redress the continuing environmental harm sanctioned by the Sixth Circuit's decision in Ohio, as followed in Pennsylvania and New Hampshire, the Court should resolve the conflict in the circuits and settle this important question of federal law as swiftly as possible, in the context of the instant case.

The decision of the Sixth Circuit Court of Appeals will prevent the *amici* and the State of Ohio from protecting their citizens from the hazards caused by violations of state police power enactments by bankrupts despite the requirements of the Tenth Amendment, 28 U.S.C. § 959(b) and 11 U.S.C. § 543(c)(1).

Tenth Amendment

State regulatory agencies throughout the nation are faced every day with the urgent need to protect their

citizens from both the immediate dangers posed by the illegal disposal of hazardous and industrial waste, as in the instant case, and by violations of the other state statutes[2] designed to protect the health, safety and welfare of the public. All such statutes represent valid exercises of the police power, reserved to the states under the Tenth Amendment to the United States Constitution. Traditionally recognized by this Court as the least limitable of the reserved powers, *Queenside Hills Realty v. Saxl*, 328 U.S. 80 (1946), the police power broadly authorizes the various states to regulate in order to protect the public health, safety and welfare.

However, legitimate state enforcement action to protect the public health, safety and welfare is thwarted when illegal activities are sanctioned by the federal bankruptcy courts. The instant case illustrates the refusal of the federal bankruptcy courts to show constitutionally mandated deference towards the states in the exercise of their police power.

In direct contravention of validly enacted state regulatory requirements, bankruptcy courts throughout the nation have sanctioned such activities as the illegal operation of highly polluting strip mines,[3] the unlicensed operation of unqualified hospitals[4] and preventing the

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[2] With respect to the example of Pennsylvania alone, *see, e.g.*, the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*; the Clean Streams Law, 35 P.S. § 691.1 *et seq.*; the Air Pollution Control Act, 35 P.S. § 4018 *et seq.*; the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 *et seq.*; the Coal Refuse Disposal Control Act, 52 P.S. § 30.51 *et seq.*; and the Bituminous Subsidence and Land Conservation Act, 52 P.S. 1406.1 *et seq.*

[3] *In re: Reddale Company, Inc., Reddale Resources, Inc., E. C. Dean Contractor, Inc.*, Nos. 79-330, 79-331, 79-332 (Bankruptcy Court, W.D. Pa.) Memorandum Opinion and Order, March 31, 1980.

[4] *In re: Saugus General Hospital, Inc.*, 4 BCD 1160, 19 CBC 651, 1 CBC2d 26 (D. Mass. 1978).

cleanup of a hazardous asbestos disposal facility.[5] The most recent incursions by the federal bankruptcy courts against state police power statutes and the Tenth Amendment occurred on November 4, 1982, when the Bankruptcy Court for the Western District of Pennsylvania adjudicated the Commonwealth of Pennsylvania in contempt and levied a substantial fine because the Commonwealth sought in the courts of Pennsylvania an injunction enforcing an administrative order pursuant to Pennsylvania law to abate the hazardous conditions created by an illegal and dangerous strip mine operated by a bankrupt,[6] and on November 15, 1982, when the State of New Hampshire and the government of the United States were enjoined from proceeding with an injunctive action seeking the cleanup of an unlawful asbestos disposal operation.[7]

The foregoing examples are by no means exhaustive. The federal bankruptcy courts have delayed, obstructed and thwarted the states in their various efforts pursuant to the police power to protect the public health, safety and welfare against the illegal operation of hazardous enterprises, despite the restraints of the Tenth Amendment. Many of these police power statutes, moreover, have been enacted to implement federal legislative action under the Commerce Clause.[8] Consequently, when the enforcement of these statutes is enjoined by the federal bankruptcy courts, it disrupts the constitutional scheme protecting

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[5] *United States, et al. v. Johns-Manville Sales Corporation, et al.*, Civil No. 81-299-D (D. New Hampshire 1982).

[6] *In re: Penn Terra Limited*, No. 82-845 (Bankruptcy Court W.D. Pa.) Memorandum Opinion, Order and Judgment, November 4, 1982).

[7] *See* n.5, *supra*.

[8] *See, e.g.*, the Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the Surface Mining Control and Reclamation Act, 30 U.S.C. 1201 *et seq.* *See also* Wein,

both the police power of the states and the power of the federal government to regulate interstate commerce. This disruption of our constitutional scheme of government demands the invocation of this Court's supervisory powers.

The Bankruptcy Reform Act

The Congress recognized and acknowledged the states' police power when it enacted the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 *et seq.* The Act makes it clear that bankrupts and bankruptcy courts may not frustrate nor obstruct the legitimate enforcement by the states of validly enacted police power statutes, in the explicit declaration that the automatic stay under Section 362 of the Act, 11 U.S.C. § 362, does not apply to that class of actions. 11 U.S.C. § 362(b)(4):

> [t]he filing of a petition under section 301, 302 or 303 of this title does not operate as a stay . . . under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.[9]

The Sixth Circuit has ignored this express policy choice by the Congress and this constitutionally mandated provision of the Bankruptcy Reform Act. Ohio stands unable to protect its citizens against the depredations of Kovacs, who by virtue of the Bankruptcy Court's action, affirmed by the Sixth Circuit, is completely insulated from his duties under the Stipulation and Judgment of July 18, 1979. If the Sixth Circuit's decision is permitted to

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Environmental Regulation and the Bankruptcy Act, 17 Duq. L. Rev. 133, 136 (1978-1979).

[9] Indeed, as Ohio correctly states in its Petition for Writ of Certiorari at pages 8-11, the legislative history of this provision forcefully underscores Congressional intent to protect state police power actions from interference by the federal bankruptcy courts.

stand, the *amici* will find themselves in the same position as Ohio: prevented from enforcing the valid laws of their states enacted pursuant to their police power because the federal bankruptcy courts have and will prevent them from so doing. Pennsylvania and New Hampshire have already suffered that fate.[10]

The Sixth Circuit has also rendered an implicit decision on the applicability of § 543(c)(1) of the Bankruptcy Code, 11 U.S.C. § 543(c)(1), which provides in pertinent part that "[t]he court, after notice and a hearing, shall . . . protect all entities to which a custodian has become obligated with respect to" property turned over to the bankruptcy court, 11 U.S.C. § 543(c)(1). The Ohio receivership was set up on February 4, 1980, and the bankruptcy was filed on July 18, 1980. When the Ohio receiver, as a "custodian" under 11 U.S.C. § 543, turned over the state receivership assets to the bankruptcy court, no effort whatsoever was made by the bankruptcy court to protect Ohio from the receiver's inability to carry out his obligations under the February 4, 1980 receivership order. To date, those obligations remain outstanding and unsatisfied. The "entity" to which the receiver is obligated for the clean up of the Kovac's hazardous waste dump—the State of Ohio—was not in any sense "protected" by the Bankruptcy court or the Sixth Circuit, despite the clear requirements of § 543(c)(1).

The productive use of state court receiverships in police power matters will inevitably be curtailed, with a concomitant increase in danger to the public health and safety, if neither the receiver nor the state to which the receiver is obligated will be protected by the federal bankruptcy courts. The Sixth Circuit has essentially decided that § 543(c)(1) of the Bankruptcy Code has no applicability to such situations. Such a fundamental dis-

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[10] *See text accompanying* n.5 and n.6, *supra*.

mantling of the Bankruptcy Reform Act and thwarting of the Congressional intent to protect the police power demands the exercise of this Court's supervisory powers.

28 U.S.C. § 959(b)

Even prior to the enactment of the Bankruptcy Reform Act, the Congress recognized its obligation to the states under the Tenth Amendment. Many years ago, the Congress addressed the problems presented when a bankrupt violates state law, in the enactment of 28 U.S.C. § 959(b), which provides in pertinent part that:

> . . . a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, according to the requirements of the valid laws of the state in which the property is situated, in the same manner that the owner or possessor thereof would be bound to do so if in possession thereof.

This Court upheld the applicability of this provision in *Gillis v. California*, 293 U.S. 62 (1934). The Sixth Circuit's decision ignores this Court's decision in *Gillis* and subverts the Congressional intent to vindicate the states' reserved police power under the Tenth Amendment. Such a radical departure from the ordinary and accepted course of judicial proceedings requires the exercise of this Court's supervisory powers.

In conflict with the decision of this Court in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S. Ct. 199, the Sixth Circuit has sanctioned the exercise of the judicial power of the United States under Article III of the Constitution by an Article I judge.

The plurality opinion in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S. Ct. 199, expressed the gravest reservations over the con-

stitutionality of the grant of jurisdiction to the bankruptcy judges under § 241(a) of the Bankruptcy Reform Act, 28 U.S.C. § 1471. The judgment of the Court was that the exercise by bankruptcy judges of jurisdiction over disputes of a purely state law nature violated Article III of the United States Constitution. The exercise of jurisdiction by the bankruptcy court below, affirmed by the Sixth Circuit, illustrates with precision the reasons why the bankruptcy courts should not be permitted Article III powers.

The day-to-day administration of the affairs of the bankrupt respecting property of the bankrupt in the actual or constructive possession of the federal bankruptcy courts may well be sanctioned under Article I, and a Congressional judgment that the federal bankruptcy courts, as a matter of social policy, possess a sufficient expertise to deal with such affairs might be justifiable. However, the exercise of the judicial power of the United States under Article III by the federal bankruptcy courts cannot be justified. An Article I tribunal has no legitimate business in interfering with a state agency's effort to protect the public health, safety and welfare by enforcing state law in state court against bankrupt violators.

The Congressional grant of All Writs powers to the federal bankruptcy courts pursuant to Section 105 of the Bankruptcy Reform Act, 11 U.S.C. § 105, is constitutionally deficient. In the instant case, Ohio presses in behalf of its citizens a legitimate police power action to abate the dangers posed by illegal hazardous waste disposal by the bankrupt, in a state action sanctioned under the Tenth Amendment. Ohio's police power is as "independent of and antecedent to the reorganization petition that conferred jurisdiction upon the bankruptcy court", *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S. Ct. 199 (1982) as the private dispute in *Northern Pipeline*. Yet, just as in *Northern Pipeline Construction, supra*, in the instant case an

Article I judge exercised and continues to exercise in an improper manner yet another Article III power: the power to issue all writs and orders "necessary or appropriate" in support of the jurisdiction granted it under § 241 of the Bankruptcy Reform Act, 28 U.S.C. 1471, which includes the power to enjoin any person from proceeding with any action on any theory in any court of the various states or the United States against the bankrupt. In Pennsylvania, based upon the reasoning of the Sixth Circuit in the instant case, a bankruptcy court has sanctioned the improper removal of a pending state court enforcement action, adjudicated Pennsylvania in contempt, fined Pennsylvania, and applied the automatic stay in such a manner as to enjoin Pennsylvania from proceeding with a valid state court action seeking to eliminate the dangerous conditions caused by an unlawful strip mine operation.[11] In New Hampshire, based again on the reasoning of the Sixth Circuit, the State of New Hampshire and the government of the United States have been enjoined from seeking an injunction to compel the cleanup of an unlawful asbestos disposal operation.[12] More disasterous examples of the vice in the exercise of Article III powers by an Article I judge are difficult to imagine.

Combining the clear conflict with this Court's plurality opinion in *Northern Pipeline*, *supra*, together with the disregard of the public health and safety and the violations of the Tenth Amendment, 28 U.S.C. § 959(b) and Section 543(c)(3) of the Bankruptcy Reform Act, the invocation of the supervisory power of this Court is urgently required to redress the injustice and peril to the public caused by the Sixth Circuit's decision below.

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[11] The bankruptcy court held that 28 U.S.C. § 1478 did not deprive it of removal power despite the express language of that provision and also held that the automatic stay applied to the Pennsylvania action. *See also text accompanying* n.6, *supra*.

[12] *See text accompanying* n.5, *supra*.

CONCLUSION

In conflict with the Fifth Circuit Court of Appeals, the Sixth Circuit Court of Appeals has erroneously applied the automatic stay of section 362(a) of the Bankruptcy Reform Act to state governments exercising their police power. Because the Sixth Circuit's decision sanctions continuing environmental harm and danger to the people of Ohio, because the Sixth Circuit's reasoning has led to similar decisions in Pennsylvania and New Hampshire, and because the Sixth Circuit's decision will frustrate the efforts of the remaining *amici curiae* as they attempt to resolve closely similar cases as they arise in their own states, the Court should settle this important question of federal law now, in the context of the instant case.

The Sixth Circuit's decision also violates the Tenth Amendment, 28 U.S.C. § 959(b) and section 543(c) of the Bankruptcy Reform Act, 11 U.S.C. § 543(c) and sanctions on a nationwide basis the extreme departure by the federal bankruptcy courts from the ordinarily accepted course of judicial proceedings. Given the immediate and continuing danger to the health and safety of the citizens of the several states, the exercise of this Court's supervisory powers is urgently needed.

The Sixth Circuit's decision also conflicts with the reasoning of the majority of this Court in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S.Ct. 199 (1982), because the Sixth Circuit has sanctioned the exercise of the judicial power under Article III by an Article I judge who possesses neither the attribute of life tenure nor protection against salary diminution. In order to rectify this gross inconsistency with the *Northern Pipeline* judgment, the Court should hear this case.

For these reasons, the *amici* respectfully request that this Court grant a writ of certiorari to review the

judgment of the United States Court of Appeals for the Sixth Circuit in this matter.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES, COMMONWEALTH OF PENNSYLVANIA, PATTI J. SAUNDERS & DIANA J. STARES,

Defendants

MEMORANDUM OPINION

The matter presently before the Court is a Petition for Contempt filed on behalf of debtor, Penn Terra Limited, against the Commonwealth of Pennsylvania Department of Environmental Resources, hereinafter "DER". The Petition for Contempt arises from DER's continued pursuit of a mandatory injunction against debtor in Commonwealth Court of Pennsylvania seeking debtor's expenditure of funds for correction of its violations of the Pennsylvania Clean Streams Act and Surface Mining Conservation and Reclamation Act. DER initiated the action in Commonwealth Court subsequent to the debtor's filing of a petition under Chapter 7 of the Bankruptcy Code; and pursued the litigation despite its receipt of the trustee in bankruptcy's petition to remove the action

from Commonwealth Court to Bankruptcy Court. The Commonwealth Court proceeding ultimately resulted in that Court's entry of an order requiring the debtor to expend funds for correction of its violations.

At the June 29, 1982 hearing on the Petition for Contempt, this Court dismissed the contempt proceedings against Diana J. Stares and Patti J. Saunders, counsel for DER. The Petition for Removal was remanded to Commonwealth Court as to Harvey Taylor, alleged president of debtor corporation; and retained as to Penn Terra Limited, debtor herein. DER was enjoined from enforcing the order of the Commonwealth Court of Pennsylvania entered against debtor and Margaret L. McArdle, trustee, pending determination of the aforesaid matter.

The serious issues presented for determination involve the applicability of the automatic stay provisions of 11 U.S.C. § 362, and removal provisions of 28 U.S.C. 1478 to the action brought by DER against debtor in Commonwealth Court.

DER contends that it is neither subject to the automatic stay provisions nor the removal provisions, for it is a governmental unit proceeding to enforce its police and regulatory powers. Based upon the facts, legislative history, and case law that follow, the Court concludes that there is no sensible basis for its position. For the reasons set forth below, the Court holds that the action initiated by DER in Commonwealth Court wherein a mandatory injunction requiring debtor's expenditure of funds was sought is in essence an attempt to enforce a money judgment. As such, it is not exempt from the automatic stay provisions of § 362 of the Bankruptcy Code. Nor is it exempt from removal under 28 U.S.C. 1478.

The facts are as follows. Penn Terra Ltd. is a Pennsylvania corporation engaged in contract coal stripping.

It filed a voluntary petition in bankruptcy under Chapter 7 of the Bankruptcy Code on March 15, 1982. Debtor had ceased all operations prior to that date. On Schedule B-2, debtor lists personal property in the approximate amount of $14,000, $13,500 of which is designated as "certificates of deposit on deposit with DER; bonds for backfilling." The schedules further note that the cost of reclamation vastly exceeds the market and book value of the bonds. Debts listed on the schedules exceed $660,000.

In November, 1981, prior to the filing of the bankruptcy petition, DER, Penn Terra Ltd., and Harvey Taylor, its president, executed a consent order and agreement arising from Penn Terra's violation of the Clean Streams Law (Act of June 22, 1937, P. L. 1987, as amended 35 P.S. § 691.1 *et* seq.); the Surface Mining Conservation and Reclamation Act, (Act of May 31, 1945, P.L. 1198 as amended 52 P.S. § 1396.1 *et* seq.); and Mining and Mine Drainage Permits. Among the various violations cited therein are the following: mining off bonded area; failure to maintain adequate backfilling equipment; failure to maintain adequate erosion and sedimentation controls; failure to pump pit water accumulations; failure to properly treat mine drainage; storage of top strata over gas lines; and failure to seal a deep mine pit. The consent agreement required Penn Terra to complete all backfilling by operating one D-8 bulldozer or its equivalent, and one tractor scraper for eight hours a day, five days a week until reclamation of said mines was completed. Penn Terra was also required to submit soil erosion and sedimentation control plans; implement the same upon approval of DER; dewater all pits; restore and revegetate original contour; seal deep mine entry; submit plans for removal of top strata stored over gas line; and implement said plan upon DER approval. The agreement provided that failure to restore said mines by the date specified therein

would result in Penn Terra's rebonding of the entire area.

On April 14, 1982, approximately one month subsequent to the commencement of the bankruptcy proceedings, DER filed a complaint in equity against debtor at No. 838 C.D. 1982. DER did not receive notice of the bankruptcy petition until April 29, 1982. Included in the various counts of the complaint were the following: I) failure to comply with the consent order and agreement; II) mining off permitted area; III) failure to backfill concurrently with mining; IV) failure to maintain adequate backfilling equipment on the site; V) failure to revegetate affected areas; VI) failure to seal a deep mine opening; VII) storage of top soil over gas line; and VIII) mining within 100 feet of stream barrier.

On April 27, 1982, the Commonwealth Court set the hearing on DER's complaint for May 24, 1982. Immediately prior to the May hearing date, the Trustee in bankruptcy filed a petition for removal of the complaint in equity from the Commonwealth Court to the Bankruptcy Court. Trustee alleges therein that the Bankruptcy Court has exclusive jurisdiction of all matters which deal with assests of the debtor; and over all injunctions which require future use, distribution, or expenditure of debtor's funds.

On May 21, 1982, the petition for removal was personally served upon DER and Diana J. Stares, Esq. by counsel for the debtor. A copy of the petition was mailed to the Commonwealth on the same date. Nonetheless, Diana J. Stares and Patti J. Saunders appeared at the May 24, 1982 Commonwealth Court hearing on behalf of DER to request that the Court issue a preliminary injunction against Penn Terra Ltd. and Harvey Taylor to enforce the terms of the November 1981 consent agreement. During the Commonwealth Court proceeding, Ms. Stares informed the Court that although she

was in receipt of the petition for removal, she was uncertain as to its effect upon the corporate defendant's liability. Penn Terra did not appear at the hearing, nor did counsel appear on its behalf. Ms. Stares continued in the presentation of DER's case, and extensive testimony was offered on DER's behalf. The Commonwealth Court filed a Memorandum Opinion and Order wherein relief requested was granted with respect to the corporate defendant. By order of Commonwealth Court of May 24, 1982, Penn Terra was ordered to perform the following: 1) by October 15, 1982, complete all backfilling and final grading at the Hilty Surface Mine; 2) within fifteen days of the date of order, submit erosion and sedimentation plans, 3) within fifteen days, seal the deep mine opening; submit plans for removal of all strata stored over gas line; and effectuate such plan upon approval from DER. All top soil spreading, mulching, and seeding was to be completed no later than October 15, 1982.

On May 27, 1982, Counsel for the debtor filed a petition for contempt against DER, Diana J. Stares and Patti J. Saunders. Therein, Counsel for the debtor alleges that DER proceeded with the application for preliminary injunction in Commonwealth Court in disregard of the trustee's petition to remove the action to the Bankruptcy Court.

At the June 29, 1982 hearing on the petition for contempt, said petition was dismissed as to individuals Diana J. Stares and Patti J. Saunders. The petition for removal as to Harvey Taylor was remanded to the Commonwealth Court; and the petition for removal as to Penn Terra was retained. This Court further ordered that DER be enjoined from enforcing the May 24, 1982 Order from the Commonwealth Court pending final determination of the aforesaid matter.

In its brief, DER argues that under 11 U.S.C. § 362(b)(4), the filing of a bankruptcy petition does not

operate as a stay of a governmental unit's proceeding to enforce its police or regulatory power. DER further avers that under 28 U.S.C. § 1478, the power to remove does not extend to a civil action by a governmental unit to enforce police powers; and as such, the attempted removal is a nullity. Finally, DER asserts that since it is subject to neither the automatic stay provisions of § 362, nor the removal provisions of § 1478, the Bankruptcy Court is presently without jurisdiction over the action brought by DER in Commonwealth Court.

On the other hand, debtor argues that a mandatory injunction requiring debtor to expend funds is in essence an action by a regulatory agency for the enforcement of a money judgment; and as such, DER's action is subject to the automatic stay. Debtor further argues that DER cannot elect to disregard a removal petition, but rather must litigate its effect before the Bankruptcy Court. For the reasons set forth below, the Court agrees.

Section 362(b)(4) of the Bankruptcy Code provides as follows:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

The legislative history of § 362(b)(4) further provides: "Where a governmental unit is suing a debtor to prevent or stop violation of a fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or atempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." House Report No. 95-595, 95th Cong. 2d Sess. at 343 (1977).

Section 362(b)(4) has been the subject of numerous recent decisions. In various situations, the Courts have upheld a governmental unit's action against a debtor as valid exercise of police or regulatory power. As such, it is exempt from the automatic stay provisions of § 362. The United States Bankruptcy Appellate Panels of the Ninth Circuit recently held that a proceeding initiated by the State of California for purposes of examining the conduct of debtor physician charged with gross negligence was a valid exercise of police power necessary for the health and safety of its residents. Accordingly, the exemption from the automatic stay provisions set forth in 362(b)(4) was applicable. *In re Thomassen*, 15 B R 907 (9 Cir. Bkrtcy. App. 1981). *In NLRB v. Evans Plumbing Co.* 639 F.2d 291 (5th Cir. 1981) a National Labor Relations Board's petition for summary judgment to enforce a Board's decision ordering debtor's reinstatement of two employees who were discriminatorily discharged fell within the § 362(b)(4) exception to the automatic stay, although the NLRB's actions were subject to certain limitations discussed below. In *In re Tauscher*, 7 B R 918, 7 BCD 124, 3 CBC 2d 536 (E. D. Wisc. 1981), the actions by the Secretary of Labor in assessing civil money penalties against debtor for violation of child labor laws was excepted from the automatic stay. The Secretary was permitted to fix penalties, up to and including the entry of a money judgment. Similarly, the administration of worker's compensation claims by the State of Ohio is a valid exercise of a governmental unit's regulatory power, and is exempt from the automatic stay. *In re Mansfield Tire and Rubber Co.* 660 F.2d 1108 (6th Cir. 1981).

Although Congress has provided an exemption from the automatic stay for governmental proceedings in the exercise of police or regulatory power, the legislative history indicates that the exception must be narrowly construed.

> This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the health and safety and not to apply to actions by a governmental unit to protect the pecuniary interest in the property of the debtor or property of the estate. (124 Congressional Record H 11089, 11 U.S. Code Congressional Administrative News 660-61 [December, 1978]).

In line with the narrow construction, some governmental actions have not been excepted from the provisions of the automatic stay. Thus, the Commissioner of Motor Vehicles, who is authorized by statute to suspend the license of an uninsured motorist involved in a motor vehicle accident unless sufficient security is provided, is subject to the automatic stay. The Court concludes: "if the focus of the police power is directed at the debtor's financial obligations rather than the state's health and safety concerns, the automatic stay is applicable." *In re Sampson*, 17 BR 528, 530, 8 BCD 992 (D. Conn. 1982). A housing authority's action to seek eviction of a tenant for nonpayment of rent is also subject to the automatic stay. *In Matter of Gibbs* 7 BCD 445 (D. Conn. 1981). Similarly, an action by a state public health agency to terminate debtor hospital's operating license violated the automatic stay. Although the case was decided under the Bankruptcy Act, the Court states that the same result would follow under the Code. *In re Saugus General Hospital, Inc.* 4 BCD 1160, 19 CBC 651, 1 CBC 2d 26 (D. Mass. 1978). A state health department's action to forfeit debtor hospital's exemption for certificate of need review in the construction of a new hospital facility is also subject to the automatic stay, for the § 362(b)(4) exception is narrow, and applies only to those actions necessary for the protection of public health and safety. *In re King Memorial Hospital, Inc.* 4 BR 704, 6 BCD 634, 2 CBC 2d 639 (S.D. Fla. 1980).

Thus, it is clear that the Courts have reached different results in determining whether various governmental actions fall within the exceptions to the automatic stay set forth in § 362(b)(4). However, on the basis of § 362(b)(5), the Courts are in agreement that the enforcement of a money judgment by a governmental unit is impermissible. Section 362(b)(5) provides as follows:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

The legislative history further provides:

> Paragraph 5 makes clear that the exception extends to permit the entry of a money judgment, but does not extend to permit the enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.
>
> House Report No. 95-595, 95th Cong., 2d Sess. at 343 (1977).

Thus, in recent decisions the Courts have restrained the state's attempted enforcement of a money judgment. *In re Fintel*, 10 BR 50, 7 BCD 531 (D. Ore. 1981); *In re Barber*, 13 BR 962, 8 BCD 188, 5 CBC 2d 150 (N.D. Tex. 1981). As previously stated, in *NLRB v. Evans Plumbing*, *supra*, the Fifth Circuit permitted the entry of a judgment for injunctive relief and for back

pay. However, the Court expressly refrained from ruling upon whether an action to enforce a money judgment would be exempt from the stay. Further, although the Secretary of Labor may fix penalties for the debtor's violation of child labor laws, the enforcement of a money judgment is stayed. *In re Tauscher, supra.* The Commonwealth of Pennsylvania's attempt to enforce a money judgment against debtor for violation of unfair trade practices law is also stayed. *In re Flick,* 14 BR 912, 5 CBC 2d 494 (E. D. Pa. 1981).

Of particular interest in resolution of the case at bar is the recent Sixth Circuit decision of *In re William Lee Kovacs* 681 F.2d 454 (6th Cir. 1982). Therein, debtor, engaged in the business of waste disposal, was sued by the State of Ohio on the basis of its water pollution. Debtor signed a stipulation and judgment entry in the Common Pleas Court of Ohio wherein he was enjoined from further pollution and required to remove industrial waste from the specified site within twelve months. As a result of debtor's noncompliance, a receiver was appointed and directed to correct the violations. Debtor filed a petition under Chapter 11 of the Bankruptcy Code in the Southern District of Ohio in July, 1980. The case was converted to a Chapter 7 in September, 1980. The state of Ohio filed a motion in Common Pleas Court for a hearing to determine debtor's employment status and income. In response thereto, debtor sought to restrain the Ohio state court proceedings. The Bankruptcy Court held that the action by the state of Ohio was not exempt from the automatic stay of § 362(a)(2). As stated by the Bankruptcy Court: "There is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him." (p. 456) In affirming the opinion of the Bankruptcy Court and District Court, the Sixth Circuit reiterates that a governmental unit is denied the power to collect money in their enforcement efforts. "We further concur with the conclusion

of the bankruptcy court and the district court that the state of Ohio, in its state court proceeding, was seeking what in essence amounted to a money judgment against Kovacs, which was properly subject to the automatic stay." (p. 456)

This Court adopts the reasoning set forth in *In re Kovacs*, and reaches a similar conclusion in the case at bar. Although DER characterizes its action as a governmental action in the exercise of its police or regulatory powers, it seeks a mandatory injunction requiring the debtor's expenditure of funds for the correction of violations. This Court concludes that the mandatory injunction sought by DER requiring the debtor's expenditure of funds is in essence the attempted enforcement of a money judgment. As such, it is subject to the automatic stay by virtue of § 362(b)(5).

Assuming arguendo that the governmental action in the case at bar was not stayed by § 362 of the Code, § 105 gives the Court broad powers to "issue any order, process or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code." Further, where government regulatory proceedings threaten assets of the debtor's estate, the Court can, in its discretion, impose a stay. *Matter of Shippers Interstate Service, Inc.* 618 F.2d 9 (6 Cir. 1980).

Having concluded that DER's action in the case at bar was subject to the automatic stay, the Court now turns to the issue of removal. DER argues that on the basis of 28 U.S.C. 1478, its action was not subject to removal. It further argues that since the removal was unauthorized, it is of no effect, and the Bankruptcy Court is presently without jurisdiction over the case at bar.

The Court first examines the general principles of removal. An order removing an action to federal court holds the state court's jurisdiction in abeyance until the action is terminated or remanded to state court. *Doerr v.*

Warner, 247 Minn. 98, 76 N.W. 2d 505 (1956), cert. dismd. *Warner v. Doerr*, 352 U.S. 801 (1956). Any further proceeding in state court is a nullity unless the case is remanded. *Hopson v. North American Co.* 71 Idaho 461, 233 P.2d 799 (1951). If necessary the federal tribunal may issue an injunction to prevent further activity in the state court. *Lowe v. Jacobs*, 243 F.2d 432 (5th Cir. 1957), cert. den. *Lowe v. Jacobs* 355 U.S. 842 (1957).

Now turning to the removal statute as it appears in the Bankruptcy Code, 28 U.S.C. § 1478 provides as follows:

> (a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power to the bankruptcy court for the district where such civil action is pending if the bankruptcy courts have jurisdiction over such claims or cause of action.

As previously determined, DER's action is in essence the attempted enforcement of a money judgment against the debtor. As such, it cannot accurately be characterized as a "civil action by a governmental unit to enforce such governmental unit's police power or regulatory power." Moreover, it is clearly not the type of action Congress intended to bar from removal to the Bankruptcy Court. As stated by the Eighth Circuit in *State of Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981):

> In light of the legislative history and court decisions under the earlier bankruptcy act, we believe that the term "regulatory or police powers" refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that

> directly conflict with the control of the res or property. (p. 776).

For the reasons that follow, the Court concludes that DER's action in the case at bar is of necessity removable to the Bankruptcy Court. As of the commencement of a bankruptcy action, the Bankruptcy Court acquires exclusive jurisdiction over all property wherever located of the debtor. 28 U.S.C. § 1471(e). The underlying goals are efficiency of administration and equality of distribution to creditors. A governmental unit's enforcement of a monetary judgment would give the governmental unit an unfair advantage over other creditors and would effectively subvert the scheme of priorities set forth in § 507 of the Code. Collier on Bankruptcy, 362.05 at 362-40 (15th Ed. 1982). To bar removal of such an action under the guise that it is a governmental action in the enforcement of its police or regulatory power is to effectively thwart the bankruptcy court's exclusive jurisdiction over property of the debtor.

In response to DER's argument that this Court is without jurisdiction in the matter at bar, it is clear that the Bankruptcy Court has jurisdiction to consider a governmental unit's activity which affects the assets of the debtor. *In re Mason*, 18 BR 817, 8 BCD 1251 (W.D. Tenn. 1982). Moreover, the bankruptcy removal statute is a federal statute, and federal law governs its interpretation. *In re Tidwell*, 4 BR 100, 6 BCD 2d 172 (N.D. Tex. 1980). As stated in Moore's Federal Practice:

> Jurisdiction of the federal courts attaches when the removal petition is filed with the state court. The state court is deprived of juridiction to proceed with the removal action unless or until remanded, irrespective of whether the action is removable, which is a question for the federal court.
>
> Vol. 1A 0.168[3-8].

As a final note, it is unfortunate that DER has taken it upon itself to interpret the applicability of the automatic stay and removal provisions of the Code to its action at bar. Its mistaken conclusion that it is immune from the restrictions set forth in the Bankruptcy Code is an unfortunate display of bureaucratic arrogance. As stated by the Third Circuit in *In re Bildisco*, 682 F.2d 72 (3rd Cir. 1982) ". . . we will not enforce a (National Labor Relations) Board order that cavalierly refuses to recognize an outstanding federal court order directly relating to the proceedings before it." (p. 23)

Given the obvious insolvency of the debtor, DER's pursuit of its action in state court subsequent to its receipt of the removal petition has resulted in the Commonwealth Court's entry of a meaningless order. Unfortunately, DER has sought to accomplish indirectly what it is obviously not permitted to do directly. The result has been a regrettable waste of judicial time.

Based on the foregoing, the Court concludes that DER's action is subject to both the provisions of the automatic stay as set forth in 11 U.S.C. § 362, and the removal provisions as set forth in 28 U.S.C. 1478. Accordingly, DER is permanently enjoined from enforcing the order of the Commonwealth Court of Pennsylvania entered against Penn Terra Limited and Margaret L. McArdle, trustee, on May 24, 1982. Further, on the basis of its contumelious conduct, the Court imposes a fine against DER in the amount of $2,500. (Twenty-five hundred dollars). The court further awards counsel fees in the amount of $150. (One hundred fifty dollars) to T. Lawrence Palmer, attorney for the debtor and $50. (Fifty dollars) to Margaret L. McArdle, trustee.

Appropriate orders will be entered.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA,
PATTI J. SAUNDERS & DIANA J. STARES,

Defendants

ORDER OF COURT

At Pittsburgh in said district this 4th day of November, 1982

It is hereby ORDERED and DECREED that the Department of Environmental Resources, Commonwealth of Pennsylvania, is permanently enjoined from enforcing the order of the Commonwealth Court of Pennsylvania entered against Penn Terra Limited ad Margaret L. McArdle, trustee, on May 24, 1982 at No. 838 C.D. 1982.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

cc: Dennis W. Strain, Esq.
T. Lawrence Palmer, Esq.
Margaret L. McArdle, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA,
PATTI J. SAUNDERS & DIANA J. STARES,
Defendants

JUDGMENT

At Pittsburgh in said district this 4th day of November, 1982

Judgement is hereby entered against the Department of Environmental Resources, Commonwealth of Pennsylvania, in the amount of Twenty-Five Hundred ($2,500.00) Dollars, payable to the Clerk, U.S. Bankruptcy Court for the Western District of Pennsylvania.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

cc: Dennis W. Strain, Esq.
T. Lawrence Palmer, Esq.
Margaret L. McArdle, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA,
PATTI J. SAUNDERS & DIANA J. STARES,
Defendants

JUDGMENT

At Pittsburgh in said district this 4th day of November, 1982

Judgement is hereby entered against the Department of Environmental Resources, Commonwealth of Pennsylvania, and in favor of T. Lawrence Palmer, attorney for the debtor, in the amount of One Hundred Fifty ($150.00) Dollars.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

cc: Dennis W. Strain, Esq.
T. Lawrence Palmer, Esq.
Margaret L. McArdle, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA,
PATTI J. SAUNDERS & DIANA J. STARES,
Defendants

JUDGMENT

At Pittsburgh in said district this 4th day of November, 1982

Judgement is hereby entered against the Department of Environmental Resources, Commonwealth of Pennsylvania, and in favor of Margaret L. McArdle, trustee, in the amount of Fifty ($50.00) Dollars.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

cc: Dennis W. Strain, Esq.
T. Lawrence Palmer, Esq.
Margaret L. McArdle, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 81-299-D

UNITED STATES OF AMERICA, ET AL.

v.

JOHNS-MANVILLE SALES CORPORATION, ET AL.

ORDER

This environmental litigation was commenced in this court by the plaintiff United States of America, which has been subsequently joined in invervention by the State of New Hampshire. Contending that health and environment have been endangered by the disposal of certain asbestos wastes, plaintiff seeks relief pursuant to § 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 ("RCRA"), and § 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9606(a) ("CERCLA"). The relief sought by New Hampshire is grounded in provisions of its Solid Waste Management Act, RSA 147:45, *et seq.* ("SWMA"), and Hazardous Waste Management Act, RSA 147-A (Supp. 1981) ("HWMA").[1]

Defendant Johns-Manville Sales Corporation ("Manville"), described as a Delaware corporation which is registered to do business in New Hampshire, is alleged to have disposed of the wastes at issue as the result of its production facility in Nashua, New Hampshire. The individual defendants[2] are described as owners of the sites

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[1] New Hampshire also claims the right to recovery under the doctrine of common law nuisance.

[2] The individual defendants are: Anthony Matarazzo and Rose Matarazzo; Arthur Bursey, Jr.; Thomas Baker; Stanley Alukonis and Sophie Alukonis; Richard Lannan and Brenda Lannan; James Choate and Joyce Choate; and Joseph Lemieux and Marie Lemieux.

in Hudson, New Hampshire, upon or in which Manville allegedly disposed of its asbestos waste. The initial complaint was filed here in June of 1981 by the United States, and subsequently New Hampshire was permitted to intervene, various cross claims were filed among the defendants, and United States was allowed to amend its complaint,[3] following which it sought to move for a preliminary injunction.

As has been well publicized, however, Manville sought relief from its creditors pursuant to the 1978 Bankruptcy Code by filing a voluntary petition, 11 U.S.C. § 301, for reorganization under Chapter XI of said Act, 11 U.S.C. § 1101, *et seq.* On August 26, 1982, the Bankruptcy Court in the Southern District of New York issued a broad restraining order[4] purporting to stay all persons and governmental units, including the plaintiffs and defendants, from commencing or continuing with any litigation against Manville. Accordingly, under date of September 30, 1982, the Magistrate in this district ordered that further proceedings herein be stayed pending the outcome of the bankruptcy proceedings.

The matter is currently before the Court on the motion of the United States, joined by New Hampshire and defendants Matarazzo, seeking vacation of the aforesaid stay issued by the Magistrate. Manville and certain of the defendants object to the vacation of said stay.[5]

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[3] The amendment, granted on April 6, 1982, allowed the addition of the claim pursuant to CERCLA, 42 U.S.C. § 9606(a).

[4] A copy of the restraining order issued by the Bankruptcy Court for the Southern District of New York was attached to the legal memo filed in behalf of Manville herein.

[5] Defendants Baker and Alukonis have joined in Manville's objection to the vacation of stay. Although certain of the parties have requested further hearing, the Court finds upon examination of the well-crafted memos filed in behalf of the primary parties and its own research that such hearing is not necessary and proceeds forthwith to resolution of the issues raised.

The thrust of the request for relief from the stay herein is to the effect that the relief here sought falls within the specific exception to 11 U.S.C. § 362(a)(1),[6] which is detailed in 11 U.S.C. § 362(b)(4) as follows:

> The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
>
> . . . .
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's *police or regulatory power* [emphasis added].

Movants urge that inasmuch as the relief here sought is injunctive under federal and state laws which authorize abatement of imminent and substantial endangerment to health caused by the disposal of hazardous asbestos wastes, this Court must vacate the stay for protection of the public. For reasons unclear,[7] neither the United States nor New Hampshire has sought to make use of its own funds for the purpose of emergency clean-up, removal, and containment action pursuant to section 104 and 107 of CERCLA, 42 U.S.C. §§ 9604, 9607, and New

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[6] 11 U.S.C. § 362(a)(1) provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

[7] It may well be that the respective government plaintiffs feel that the funds available to them are inadequate to provide the relief actually sought herein and that they must accordingly seek to press the instant action against Manville. *See United States* v. *Wade*, 546 F. Supp. 785, 792-94 and n. 22 (E.D. Pa. 1982).

Hampshire's Hazardous Waste Cleanup Fund, RSA 147-B (Supp. 1981) ("HWCF"). Manville argues that as the actual relief here sought is not the injunction of ongoing waste disposal on its part but is the expenditure of funds to rectify what it depicts as long-past disposal practices, the limited relief from bankruptcy stay outlined in 11 U.S.C. § 362(b)(4) should not be here applied.

We commence our analysis with review of the relief sought at pp. 8, *et seq.*, of the amended complaint in behalf of the United States, Document 59. While it is true that movants seek injunction against the allowance or causation of disposal of any asbestos or other hazardous wastes or substances at the sites owned by the individual defendants and also request injunctive relief from the allowance or causing of the alteration of any part of the aforesaid sites without the approval of the Environmental Protection Agency ("EPA"), ¶¶ A and B, a fair reading of the remainder of the relief sought demonstrates that if found to be required, its implementation would require the exepnditure of substantial funds on the part of Manville. Thus it is sought to require Manville to prepare and implement a plan to be approved by EPA for covering all of the sites at issue with soil and vegetation and to maintain such cover in order to prevent asbestos fibers from becoming airborne, ¶ C, and to erect fences and post warnings around each of the aforesaid sites, ¶ D(1-4).[8] Additionally, plaintiffs here

[8] In the course of ordinary trial preparation prior to entry of the stay herein, defendants Matarazzo's disclosure of experts pursuant to the applicable provisions of Rule 26(b)(4), Fed. R. Civ.P., Document 110, has attached to it an estimate by an expert environmental witness which purports to demonstrate that the cost of removal and cover of the waste on the Matarazzo site alone would exceed $1 million. While establishment of any such amount would naturally require proof adduced in accord with proper trial procedure, such estimate is here referred to merely to illustrate that if the plaintiffs herein are successful in the relief sought, substantial sums of money will be required to implement such relief.

seek to require Manville to post a performance bond for the accomplishment of all necessary remedial actions.

From the foregoing it can be seen that regardless of its description the relief here sought actually seeks the expenditure of substantial funds from the assets of Manville which are now within the jurisdiction of the Bankruptcy Court for the Southern District of New York.[9] And although the plaintiffs could easily seek to sever and proceed with their claims against the defendants[10] who are allegedly the owners in possession of the premises upon which threatened imminent danger exists, no such suggestion is here made.[11]

The legislative history of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, is substantially detailed in 1978 U.S. Code Cong. & Ad. News, commencing at p. 5787. Referring respectively and selectively to identical

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[9] At this point, the Court notes that even though it undoubtedly possesses jurisdiction to review the issuance of the stay by its Magistrate pursuant to the provisions of 28 U.S.C. § 636, even were such relief to be afforded, it might well prove illusory, for it is the bankruptcy judge "who is the most knowledgeable about the debtor's affairs, and about the effect that any judicial proceeding would have on the debtor's reorganization" and who ultimately, therefore, retains the jurisdiction of determining whether an action against the debtor may proceed or whether the bankruptcy court's stay should remain in effect. *Association of St. Croix Condominium Owners* v. *St. Croix Hotel Corporation*, 682 F.2d 446, 448 (3d Cir. 1982).

[10] It is well established that the commencement of Chapter XI proceedings with resulting stay as against the debtor therein does not serve to stay proceedings against codefendants who are not themselves seeking the relief of bankruptcy. *Royal Truck & Trailer* v. *Armadora Maritime Salvadorena, et al.*, 10 B.R. 488 (Bkrtcy. N.D. Ill. 1981).

[11] Indeed, the relief herein sought as against the individual defendants appears to be limited to requiring them to note on their deeds the existence of the hazardous waste on their premises and to permit inspection of said premises for testing and monitoring purposes.

provisions set forth in both the Senate, *id.* at 5838, and the House, *id.* at 6299, Reports, the plaintiffs stress that it is obvious that this case is one in which automatic stay is not applicable. Such argument overlooks the requirement that 11 U.S.C. § 362(b)(4) must of necessity be read in conjunction with 11 U.S.C. § 362(b)(5), which excepts from the automatic stay "of the enforcement of a judgment, *other than a money judgment*, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power". Thus, the identical, language in the Senate and House Reports which immediately follows that relied on by the plaintiffs herein states:

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

1978 U.S. Code Cong. & Ad. News, at 5838, *id.* at 6299.

Additionally, the legislative leaders who presented the Bankruptcy Code, i.e., Representative Edwards and Senator DeConcini, made clear that the application of 11 U.S.C. § 362(b)(4) "is intended to be given narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate". 1978 U.S. Code Cong. & Ad. News, at 6444-45 (remarks of Representative Edwards), and at 6513 (remarks of Senator DeConcini). Such remarks merely restate the well-established rule of law to the ef-

fect that "[a] plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money". *Jaffee* v. *United States*, 592 F.2d 712, 715 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979), *quoted in United States* v. *Price*, 523 F. Supp. 1055, 1067 (D.N.J. 1981) (holding under RCRA and CERCLA plaintiff not entitled to preliminary injunction which would require past and current owners of landfill to fund study to monitor extent of problem posed by leachate emanating from landfill, to devise solution to such problem, or to provide alternate water supply to those home owners whose wells were contaminated by such leachate).

The Court does not find persuasive the case authority relied upon by the movants herein. *In the Matter of Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979), concerns circumstances where an authorized administrative agency which had been upheld by a local court had entered a cease and desist order foreclosing the continued operation of the debtor's quarry as violative of the Federal Clean Air Act, 42 U.S.C. § 7401, *et seq.* Subsequent to such administrative and judicial proceedings, the debtor sought relief under Chapter XI of the 1898 Bankruptcy Act, and the bankruptcy court authorized the debtor's continued operation of its quarry. In reversing the bankruptcy court, the district court predicted in dicta that 11 U.S.C. § 362(b)(4) would mandate exception to any stay. In the course of that portion of its opinion, however, the court quoted language which referred to the "narrow construction" which was to be given 11 U.S.C. § 362(b)(4). 466 F. Supp. at 1340.

In Re Mansfield Tire and Rubber Company, 660 F.2d 1108 (6th Cir. 1981), held that a bankruptcy court could not stay the administration by the State of Ohio of its workers' compensation claims, but in the course of so doing pointed out that the "insurance fund, not the debtor's estate, pays the claims for which the employer has paid the premium". 660 F.2d at 1113. In a subse-

quent decision, the Sixth Circuit explained its decision in the *Mansfield* case, in pertinent part, as follows:

> The debtor in *Mansfield* was not subject to making payments on its workers' claims that would resemble a money judgment, since payment of claims would come from premium funds already deposited by the debtor with the state, upon which the debtor had no legal claim. Accordingly, the exception to the automatic stay was applicable in that case, because enforcement of a money judgment liability was not imposed upon the debtor, and the administration of the claims was pursuant to Ohio's police power.

In re Kovacs, 681 F.2d, 454, 456 (6th Cir. 1982).

The decision in *Commonwealth of Pennsylvania, Department of Environmental Resources* v. *Peggs Run Coal*, 423 A.2d 765 (Pa. Commw. 1980), involved a complaint seeking injunctive relief and the posting of bonds as against an ongoing mining operation which was purportedly in violation of certain state environmental laws. The Court held that such action was not automatically stayed by the commencement of bankruptcy proceedings and was within the exception of 11 U.S.C. § 362(b)(4) and (5).[12] *NLRB* v. *Evans Plumbing Company*, 639 F.2d 291 (5th Cir. 1981), held that an enforcement proceeding of an NLRB order reinstating two employees with back pay was excepted from bankruptcy stay pursuant to 11 U.S.C. § 362(b)(4), as such action sought enforcement of federal labor laws regulating the relationship between employer and employee.

SEC v. *First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981), held that the appointment of a receiver

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[12] More recently, the highest state court in New Jersey has held that an action to fix damages for violation of Medicaid fraud statutes is not automatically stayed by the filing of a petition for bankruptcy in behalf of the errant physician. *In Re Garay*, 89 N.J. 104, 444 A.2d 1107 (1982).

for a securities dealer against which involuntary bankruptcy had been filed was not precluded by the bankruptcy stay as such appointment serves "to prevent dismemberment of the corporate estate by management personnel who have been found to have acted fraudulently and who could otherwise easily dispose of the assets to the detriment of the debtor's creditors. 645 F.2d at 439. And *In Re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248 (9th Cir. 1979), another case brought under the 1898 Bankruptcy Act, held that the regulatory proceedings of the NLRB with reference to unfair labor practices involving two employees of the debtor could not be stayed in bankruptcy.

Were the circumstances of the instant case such that the relief sought was an injunction which would require Manville to cease and desist from ongoing deposit of asbestos wastes on real property sites in New Hampshire, together with the additional posting of a modest performance bond to ensure compliance with such order, this Court would agree that the above-cited cases relied on by movants would indicate that such relief should not be stayed under 11 U.S.C. § 362(b)(4). Unfortunately, this is not such a case. The circumstances herein depict federal and state governments which are either unable or unwilling to take the necessary financial steps to protect the public from what are long extant but apparently recently discovered dump sites containing hazardous wastes, and the same plaintiffs are similarly unwilling to proceed against the current owners who are in possession of such sites. Clearly the relief sought is directed against Manville alone and will require it to divert substantial of its assets now held in the jurisdiction of a bankruptcy court from the claims of numerous creditors, many of whom allege that they are themselves suffering serious physical debilitation as a result of the inhalation of asbestos fibers. Cast in this light, it is clear to this Court that the exception from stay detailed in 11 U.S.C. § 362(b)(4) is not here applicable.

Instructive in this regard is the opinion of the Sixth Circuit in *In Re Kovacs, supra.* There the defendant and certain entities controlled by him were engaged in the business of industrial waste disposal and had been ordered by a state court to cease and desist operations and to remove all industrial wastes from their business premises. On the failure of defendant to do so, the state sought appointment of a receiver over his business assets. Defendant filed in bankruptcy and subsequently sought to restrain in the bankruptcy court proceedings in the state court directed toward inquiry into defendant's current assets and employment. On appeal of the stay issued by the bankruptcy court, the Court of Appeals in affirming such stay said in pertinent part:

> We concur with the bankruptcy court's conclusion that § 362 indicates a clear intent to permit governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition, but to deny those units the power to collect money in their enforcement efforts. We further concur with the conclusion of the bankruptcy court and the district court that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs, which was properly subject to the monetary stay. We note that the state court's order appointing a receiver also ordered that Kovacs turn over all his non-exempt assets to the receiver, and authorized the receiver to collect any sums of money that would become payable to Kovacs in the future. There is very little in substance to distinguish that order and a money judgment.

Id. at 456.

As has been elsewhere stated, the term "police or regulatory power" contained in 11 U.S.C. § 362(b)(4) has reference to the enforcement of laws "affecting

health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court". *State of Missouri* v. *United States Bankruptcy Court, et al*, 647 F.2d 769, 776 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 1035 (1982) (state grain warehouse laws, although regulatory in nature, held to primarily relate to the protection of the pecuniary interest in the debtor's property and not to matters of public health and safety).

In sum, while plaintiffs herein could choose to amend their pleadings and proceed pursuant to sections 104 and 107 of CERCLA, 42 U.S.C. §§ 9604, 9607, proceed immediately with government funds to clean up the hazards which they depict to be existing at the waste sites described, and then seek reimbursement from Manville pending resolution of the bankruptcy proceedings, they have not chosen to do so.[13] In lieu of such proceedings, they suggest that this Court may wrest from the bankruptcy jurisdiction the substantial assets which would be required were the relief here sought to be ordered after trial.[14]

This Court has no such jurisdiction, and it should be noted that nothing in this Order seeks to prevent any party in interest herein from seeking relief from the stay of the bankruptcy court by proper application to such court. The Court finds and rules, however, that in entering its Order of September 30, 1982, the Magistrate acted properly, and that the motion to vacate his stay

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[13] This was the procedure followed in *City of Philadelphit* v. *Stepan Chemical Company*, 544 F. Supp. 1135 (E.D. Pa. 1982), where the City expended its own funds to clean up the hazardous wastes which had been illegally dumped by others and then sought to recoup such under § 107 of CERCLA.

[14] *See United States* v. *Reilly Tar & Chemical Corporation*, 546 F. Supp. 1100 (D. Minn. 1982), for detailed indication of activities which might be taken against solvent past disposers of hazardous wastes.

in the instant proceedings must be and it is herewith denied.

SO ORDERED.

/s/ [Illegible]
Chief Judge
United States District Court

November 15, 1982
cc: All Counsel